Supreme Court, U.S.
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No. 02-683

IN THE

Supreme Court of the United States

WORLD WIDE MINERALS LTD., WORLD WIDE RESOURCE FINANCE INC., KAZURAN CORP., and NUCLEAR FUEL RESOURCES CORP.,
Petitioners,

v.

THE REPUBLIC OF KAZAKHSTAN, THE STATE COMMITTEE OF THE REPUBLIC OF KAZAKHSTAN ON THE MANAGEMENT OF STATE PROPERTY, and THE NATIONAL ATOMIC COMPANY KAZATOMPROM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL ATOMIC COMPANY KAZATOMPROM IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, express waivers of sovereign immunity by the Republic of Kazakhstan in two contracts waived sovereign immunity for claims arising under two other contracts, neither of which included a waiver of sovereign immunity.

2. Whether the act of state doctrine precludes a U.S. court from reviewing the validity of the Republic of Kazakhstan's denial of an export license for uranium mined in Kazakhstan.

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OPINIONS BELOW

The opinion for the court of appeals (Pet. App. 1a-29a) is reported at 296 F.3d 1154. The opinion of the district court (Pet. App. 30a-50a) is reported at 116 F. Supp. 2d 98.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 2002. The petition for a writ of certiorari was filed on October 31, 2002.

STATEMENT

Petitioners—World Wide Minerals, Ltd., a Canadian corporation, and its affiliates and subsidiaries World Wide Resource Finance, Inc., KazUran Corp., and Nuclear Fuel Resources Corp.—challenge the court of appeals' ruling that their amended complaint is barred by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, and by the act of state doctrine.

1. Petitioners entered into four agreements with respondents—the Republic of Kazakhstan, and two instrumentalities of the Republic of Kazakhstan, the State Committee of the Republic of Kazakhstan on the Management of State Property and the National Atomic Company Kazatomprom (referred to collectively as "Kazakhstan"). Under those agreements, petitioners promised to take various measures to revitalize the uranium mining industry in Kazakhstan in a complex known as the TGK complex. Among other things, petitioners agreed to loan and invest money and to manage the mines. In exchange for their investments, the agreements provided that petitioners would receive special consideration in obtaining the right to export the uranium outside of Kazakhstan. Pet. App. 4a-5a.

Two of the four agreements entered into by petitioners and respondents contain waivers of sovereign immunity: the Management Agreement, under which Kazakhstan granted petitioners the right to manage the TGK complex, *id.* at 4a; and the Pledge Agreement, under which Kazakhstan gave petitioners a security interest in the assets of TGK as collateral on its loans, *id.* at 5a; *see also id.* at 15a. The other two agreements—the Loan Agreement, under which petitioners agreed to loan Kazakhstan at least $5 million to restore the TGK complex, *id.* at 4a; and the Strategic Alliance Agreement, under which Kazakhstan and petitioners agreed to form a joint venture to mine and market uranium, and under which Kazakhstan agreed to "assist" petitioners in

obtaining an export license, *id.* at 5a—do not include sovereign immunity waivers and instead provide for resolution of disputes in arbitration outside of United States courts.

Petitioners allege that Kazakhstan acted to defraud them by denying them a license to export uranium: "Most significantly, the Kazakhstan Defendants denied [petitioners'] applications for uranium export licenses." C.A. App. 45 (Amended Complaint ¶ 20). "By denying the application," the amended complaint alleges, "the Kazakhstan Defendants intentionally prevented [petitioners'] recovery of its principal and compensation contemplated by the Agreements." *Ibid.* The amended complaint thus describes the allegedly wrongful denial of the export license as "the very heart of this matter." Pet. App. 20a (quoting Amended Complaint ¶ 157).

2. In May 1998, petitioners sued Kazakhstan in the United States District Court for the District of Columbia. In its 11-count amended complaint, petitioners allege that Kazakhstan wrongfully denied them a uranium export license and seized their assets in Kazakhstan. Based on those allegations, petitioners allege breach of contract, fraudulent inducement, tortious interference, conversion, conspiracy, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* *See* Pet. App. 8a n.4 (listing counts of the complaint). In addition to naming Kazakhstan as a defendant, petitioners also named as a defendant Nukem, Inc., a New York corporation that allegedly conspired with Kazakhstan to commit the wrongful acts against petitioners.

The district court granted Kazakhstan's motions to dismiss on the ground that the claims are barred by the act of state doctrine. Pet. App. 30a-50a. The court first concluded that it had subject matter jurisdiction under the express waiver exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(1), because Kazakhstan had waived its sovereign immunity in the Management and Pledge Agreements.

Pet. App. 35a-37a. The court concluded that the act of state doctrine precluded adjudication of petitioners' claims because it "would require a judgment on the acts of a sovereign state," *i.e.*, Kazakhstan's failure to issue petitioners an export license. *Id.* at 37a-40a. The court also denied as futile petitioners' motion to file a second amended complaint. *Id.* at 49a.

3. The court of appeals affirmed the judgment. Pet. App. 1a-29a. Unlike the district court, the court of appeals concluded that the waivers of sovereign immunity found in the Management and Pledge Agreements established federal jurisdiction only for the claims arising under those agreements. *Id.* at 11a-19a. Accordingly, the court ruled that the district court lacked subject matter jurisdiction for petitioners' claims that which were not based on the Management and Pledge Agreements. The court of appeals agreed with the district court that the remaining claims were barred by the act of state doctrine because they challenged a sovereign act of Kazakhstan. *Id.* at 19a-26a.

ARGUMENT

The court of appeals correctly ruled that petitioners' claims are barred by the FSIA and the act of state doctrine. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly ruled that the waivers of sovereign immunity contained in the Management Agreement and the Pledge Agreement should be construed to apply only to claims arising under those agreements. Pet. App. 11a-19a. Federal courts have uniformly concluded that waivers of sovereign immunity should be construed narrowly in favor of the sovereign. As this Court has stated, explicit waivers of federal sovereign immunity are construed "in favor of the sovereign" and are not enlarged "beyond what the language requires." *Library of Cong. v. Shaw*, 478 U.S. 310, 318

(1986). The lower courts have uniformly held that the same principle applies under the FSIA and that a waiver of foreign sovereign immunity will be found only when a foreign sovereign has given "a clear, complete, unambiguous, and unmistakable manifestation of the sovereign's intent to waive its immunity." *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999); *see also Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari*, 12 F.3d 317, 325 (2d Cir. 1993) (waiver under the FSIA must be "unmistakable" and "unambiguous"); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 n.10 (D.C. Cir. 1982) (waivers under the FSIA must be of a "specific and explicit nature").

Petitioners cite no cases to support their position that the court of appeals erred in ruling that the waiver of sovereign immunity found in two contracts should be applied to claims arising outside those contracts. The alternative dispute resolution procedures provided in those other contracts suggests that no waiver of immunity from suit was intended in U.S. courts. In any event, petitioners do not challenge the legal principle that guided the court of appeals' conclusion, that waivers of sovereign immunity should be construed narrowly, and instead challenge the court's construction of specific contractual language. That issue does not merit this Court's review.*

2. The court of appeals correctly ruled that the act of state doctrine bars federal courts from assessing the validity of Kazakhstan's denial of an export license. Pet. App. 19a-26a.

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* Petitioners argue (Pet. 6) that the court of appeals erred in ruling that petitioners waived reliance on the commercial activities exception to the FSIA. As the court of appeals correctly noted, however, petitioners failed to address this issue in their court of appeals' brief, notwithstanding extensive briefing of the issue by respondents. Pet. App. 12a-13a. In any event, the fact-bound issue of petitioners' waiver does not merit further review.

As this Court has held, the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The courts of appeal have uniformly concluded that acts of the type challenged by petitioners are sovereign in nature. Thus, the "right to regulate imports and exports is a sovereign prerogative." *Millen Indus. v. Coordination Council for North Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988); *see also MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984) ("[L]icensing the exploitation of natural resources is a sovereign activity"); *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) (affirming "the principle of supreme state sovereignty over natural resources").

Petitioners appear to concede that Kazakhstan's denial of an export license is a sovereign act that cannot be judged by U.S. courts. *See* Pet. 19. ("Petitioners recognize that a refusal to grant an export license in a sterilized setting has been considered an act of state which the federal courts will not review."). Petitioners argue (Pet. 6-18) that the court of appeals erred by failing to apply an exception to the act of state doctrine for commercial activities. The court of appeals correctly held, however, that the existence of such an exception is not raised by this case because petitioners' claims address non-commercial conduct, *i.e.*, Kazakhstan's denial of an export license. Pet. App. 23a-24a. In so ruling, the court of appeals expressly stated that it did not need to decide whether to recognize a commercial activity exception to the act of state doctrine. *Id.* at 23a ("The existence of such an exception is an unsettled question that this court has never addressed. Nor need we do so today."). Accordingly, the existence of an exception to the act of state doctrine for commercial activities is not raised by this case.

Petitioners further argue that Kazakhstan's denial of an export license was "auxiliary" to the acts they challenge. Pet. 19-29. Petitioners go so far as to assert that they "did not challenge the export license denial." Pet. 23. That argument cannot be squared with petitioners' amended complaint, which alleges that Kazakhstan committed fraud and breach of contract by "failing to issue an export license," and which describes "the denial of [the] export license" as "the very heart of this matter." Pet. App. 20a (quoting Amended Complaint ¶¶ 93, 157). Petitioners can point to no provisions of their amended complaint that undermine the court of appeals' conclusion that their complaint sought to challenge the export license denial. Even if they could do so, petitioners' disagreement with the court of appeals' construction of their amended complaint does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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